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**International
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TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA
AND
*UHURU MUIGAI KENYATTA***

Public

**Defence Submissions on Article 61(11) and Article 64(4) of the Rome Statute in
Accordance with the Trial Chamber's Order scheduling a status conference and
agenda, dated 5 March 2013**

Sources: Counsel for Ambassador Francis Kirimi Muthaura

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. On 5 March 2013, the Trial Chamber (“Chamber”) issued the “Order scheduling a status conference and agenda”,¹ in which it scheduled a status conference for 11 March 2013 for the purposes of “receiv[ing] additional information on certain legal issues arising out of the applications by the defence for Mr Kenyatta and the defence for Mr Muthaura . . . to order that the preliminary issue of the validity of the Confirmation Decision be referred back to the Pre-Trial Chamber as well as various related filings.”²
2. In particular, the Chamber, *inter alia*, requested that the Defence of Ambassador Muthaura and the Defence of Mr Kenyatta make submissions on the following two issues by noon on 8 March 2013³:

B. The definition of a “preliminary issue” referred to in Article 64(4) of the Statute and whether the relief sought by the Defence falls under the definition;

C. The scope of the Trial Chamber's powers under Article 61(11) to address the defence request.

3. With respect to issue ‘B’, the Defence of Ambassador Francis K. Muthaura (“Defence”) respectfully submits that the three issues⁴ identified at paragraph 3

¹ ICC-01/09-02/11-673.

² *Ibid.*, para. 2 (internal citations omitted).

³ The Chamber also requested the Prosecution to make submissions on these two issues, in addition to three other issues (‘A’, ‘D’ and ‘E’).

⁴ The three issues are: (i) Whether non disclosure by the OTP of potentially exonerating evidence (PEXO) which was in its possession at the time of the confirmation hearing vitiates the validity of the confirmation decision itself? (ii) Whether this case can or should properly proceed to trial when the OTP has decided to drop the core planning meeting alleged at confirmation and, additionally, no longer seeks to rely upon the only witness it presented to prove that meeting at the confirmation stage? and (iii) Additionally, or in the alternative, whether new facts recently alleged in the Pre-Trial Brief and not alleged or previously disclosed at the time of confirmation, and not subjected to any judicial scrutiny, require a new confirmation of charges hearing before a Trial Chamber is required or authorised to determine them? In the event that the Trial Chamber is minded to grant the Defence application, additional consequential orders or refinement of the terms of referral may be

of the Defence's Article 64(4) Application,⁵ fall squarely within the parameters of the definition of "preliminary issues" for the purposes of Article 64(4) of the Statute. The first two issues concern the validity of the confirmation hearing and confirmation decision, upon which the trial of Ambassador Muthaura is founded. The third issue pertains to whether the fundamentally changed theory of the case put forward by the Prosecution in its Pre-Trial Brief circumvents the role and authority of the Pre-Trial Chamber to define the scope of a case for trial, and is therefore improper. These matters must be resolved prior to the commencement of trial – indeed, the Defence submits, a trial of Ambassador Muthaura that proceeds without resolving these essential issues cannot be fair.

4. With respect to issue 'C', the Defence submits that the Trial Chamber is vested with the authority, and indeed the responsibility, to act pursuant to Articles 61(11) and 64(6)(a) and (f) to consider and decide upon the underlying merits of and relief sought in the Defence Article 64(4) Application. Namely, whether the confirmation decision in this case was vitiated by the non-disclosure by the Prosecution of critical PEXO evidence, as articulated in Defence Article 64(4) Application and related filings, and in view of the fact that the Prosecution does not oppose a new confirmation hearing for Ambassador Muthaura and indeed accepts that it "presents the extremely rare case where it is appropriate to contemplate sending the case back to the Pre-Trial Chamber for reconsideration on the basis of the withheld affidavit."⁶ The Defence appreciates the opportunity to make additional submissions on the inter-relationship between

necessary to render effective the referral. Specifically, in relation to (iii) above, it would, of course be necessary to require a new confirmation hearing on any new facts alleged by the prosecution.

⁵ Public Redacted Version of "Defence Application pursuant to Article 64(4) for an order to refer back to Pre-Trial Chamber II or a Judge of the Pre-Trial Division the Preliminary issue of the Validity of the Decision on the Confirmation of Charges or for an order striking out new facts alleged in the Prosecution's Pre-Trial Brief and Request for an extension of the page limit pursuant to Regulation 37(2)", 7 February 2013, ICC-01/09-02/11-628-Red ("Article 64(4) Application").

⁶ Public redacted version of the 25 February 2013 Consolidated Prosecution response to the Defence applications under Article 64 of the Statute to refer the confirmation decision back to the Pre-Trial Chamber, 25 February 2013, paras. 9 and 44 ("Prosecution Response").

Articles 61(11) and 64(4) of the Statute and will seek to fill the gap left in its original Article 64(4) application on this issue. Simply put, the Statute grants the Trial Chamber with primary responsibility and authority to determine, with very limited exception,⁷ all matters pertaining to the case against Ambassador Muthaura. With that general assertion, the Defence will seek to make more specific submissions on the two issues that the Trial Chamber has required submissions on.

II. ISSUE 'B' – THE DEFINITION OF A “PRELIMINARY ISSUE”

5. As submitted by former ICC Judge Pikis, in his commentary on the Rome Statute,⁸ “[p]reliminary issues are not identified or specified” for the purposes of Article 64(4), but “[i]n the context of a trial, preliminary issues are those that must be addressed before the commencement of the trial” and “[i]ncluded amongst them are, by virtue of Article 64.6(a), functions of the Pre-Trial Chamber referred to in article 61.11 [...] save ruling on the admissibility or relevance of evidence and maintaining order in the course of trial proceedings”.⁹ The Triffterer commentary on the Rome Statute (“Triffterer Commentary”) similarly clarifies that “preliminary issues” are limited to those matters falling under Part 5 of the Statute (‘Investigation and Prosecution’),¹⁰ which of course includes matters pertaining to the confirmation of charges hearing and confirmation decision under Article 61 of the Statute.
6. The Defence submits that issues pertaining to the underlying validity of the confirmation hearing process and the confirmation decision, upon which the trial proceedings are based, are undoubtedly issues “that must be addressed

⁷ For example, requests by the Prosecution to amend the charges post-confirmation decision pursuant to Article 61(9) of the Statute.

⁸ J. Pikis, *The Rome Statute for the International Criminal Court* (2010).

⁹ *Ibid.*, p. 154.

¹⁰ O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (2008), p. 1211.

before the commencement of the trial". Accordingly, the Defence submits, the three issues identified at paragraph 3 of the Defence Article 64(4) Application qualify as "preliminary issues" for the purposes of Article 64(4). Issues (i) (*Whether non disclosure by the OTP of potentially exonerating evidence (PEXO) which was in its possession at the time of the confirmation hearing vitiates the validity of the confirmation decision itself?*) and (ii) (*Whether this case can or should properly proceed to trial when the OTP has decided to drop the core planning meeting alleged at confirmation and, additionally, no longer seeks to rely upon the only witness it presented to prove that meeting at the confirmation stage?*) squarely address the validity of the Confirmation Decision issued by the Pre-Trial Chamber in this case.

7. Issue (iii) (*Additionally, or in the alternative, whether new facts recently alleged in the Pre-Trial Brief and not alleged or previously disclosed at the time of confirmation, and not subjected to any judicial scrutiny, require a new confirmation of charges hearing before a Trial Chamber is required or authorised to determine them?*) similarly entails an examination of matters that must be resolved prior to the commencement of trial. Namely, whether the case put forward by the Prosecution in its Pre-Trial Brief has circumvented the essential role and purpose of the Pre-Trial Chamber pursuant to Article 61(7) to determine the core 'facts and circumstances' of the case against an Accused for trial, and beyond which the Prosecution may not travel without returning to the Pre-Trial Chamber to seek permission to amend the charges pursuant to Article 61(9).
8. The Defence submits that there should be little (if any) controversy with respect to whether the three issues identified in the Defence Article 64(4) Application, as regards the case against Ambassador Muthrua, may qualify as "preliminary issues" for the purposes of Article 64(4) of the Statute. Indeed, the Prosecution

submits that “[i]n the particular circumstances of Mr Muthaura’s case . . . the Prosecution does not oppose new confirmation proceedings with respect to him”.¹¹

9. Once a Trial Chamber determines that an issue is a “preliminary” one for the purposes of Article 64(4), it must then determine, also pursuant to Article 64(4), whether referral of the issue to the Pre-Trial Chamber or an available judge of the Pre-Trial Division is “necessary for [the Trial Chamber’s] effective and fair functioning”. As with the determination of what constitutes a “preliminary issue”, the Statute clearly and equally entrusts the Trial Chamber with the sole responsibility for determining whether it is “necessary” for the Trial Chamber’s “effective and fair functioning” to refer the identified “preliminary issue” back to the Pre-Trial Chamber.

10. As noted in the Triffterer Commentary:

*[T]he Trial Chamber itself will be the only ‘judge’ about what is necessary for its effective and fair functioning: in this regard, it will have a discretionary power to decide to refer preliminary issues to the Pre-Trial Chamber which won’t be in a position to refuse to deal with these issues, except if it decides that the issues referred exceeds its competence under the Statute.*¹²

According therefore to the above commentator, a Pre-Trial Chamber may only decline to consider and decide upon the merits of an issue referred by a Trial Chamber pursuant to Article 64(4) in circumstances when the Pre-Trial Chamber determines the matter is beyond its legal competence – for example, as indicated above, maintaining order in trial proceedings. The Defence, however, would slightly add to that analysis. A proper interpretation of the Rome Statute is one that renders it effective (the principle of effectiveness or *l’effet utile*). The Defence submits that where the Rome Statute confers a power

¹¹ Prosecution Response, para. 9.

¹² Gilbert Bitti in *Commentary on the Rome Statute* by Otto Triffterer, p. 1211.

on a Trial Chamber of the ICC to refer matters to a Pre-Trial Chamber or available judge of the Pre-Trial division, it suggests, absent any provision to the contrary, that it is incumbent on Pre-Trial Chambers or any available judge of the PTD to consider any such matter referred. The Pre-Trial Chamber or any such judge of the PTD to whom the matter is referred may “go behind” the findings which are the preserve of the Trial Chamber. These findings specifically include what is or is not a “preliminary issue” and whether or not such a referral is necessary in order to ensure the “effective and fair functioning” of the Trial Chamber.

11. Indeed, if it were otherwise, the Chambers of the Court might enter what would be akin to a situation of *renvoi* arising in the context of a conflict of laws between jurisdictions, wherein the Trial Chamber and Pre-Trial Chamber effectively refer the issue at hand ‘back’ to the other Chamber, and to the detriment of efficient proceedings and the effective functioning of the Court. In the same manner that a Trial Chamber does not have appellate jurisdiction over a Pre-Trial Chamber,¹³ the Pre-Trial Chamber certainly does not have appellate jurisdiction over a Trial Chamber and may not second-guess the exercise of what is the Trial Chamber’s exclusive authority and responsibility to act pursuant to Article 64(4). If a Pre-Trial Chamber were to do so, the Defence respectfully submits, it acts *ultra vires*,¹⁴ unless it is the limited circumstance where the Pre-Trial Chamber determines it does not have the competence to act on the referred issue.

¹³ *Prosecutor v. Lubanga*, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, ICC-01/04-01/06-1084, 13 December 2007, para. 43 (“*The Pre-Trial Chamber and the Trial Chamber have separate functions at different stages of the proceedings, and there is no hierarchy of status between them. The Trial Chamber has not been given an appellate jurisdiction over any decision of the Pre-Trial Chamber . . . and most particularly the Trial Chamber has not been given a power to review the only decision of the Pre-Trial Chamber that is definitely binding on the Trial Chamber: the Decision on the confirmation of charges.*”).

¹⁴ *Ibid.* (“*It follows that the Trial Chamber would be acting ultra vires if it followed the prosecution’s ‘first route’ and attempted to interfere with, or strike down, the decision of the Pre-Trial Chamber on an issue over which it has exclusive control.*”).

12. The Rome Statute, as an international treaty, must, of course, be interpreted in line with Article 31(1) of the Vienna Convention on the Law of Treaties, which requires that a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of a treaty in their context and in light of their object and purpose. In this regard, the ICTY Trial Chamber in its Judgment in the *Prosecutor v. Delalic et al.*, quoted with approval Theodor Meron's position that "[i]n interpreting the law, our goal should be to avoid paralyzing the legal process as much as possible . . .".¹⁵
13. Accordingly, the Defence respectfully submits that once a Trial Chamber exercises its discretionary authority to refer a "preliminary issue" back to a Pre-Trial Chamber, it is the obligation of the Pre-Trial Chamber to consider and decide upon the merits of the referred issue.

III. ISSUE 'C' – TRIAL CHAMBER AUTHORITY UNDER ARTICLE 61(11)

14. Article 64(6)(a) states that: *"In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary: (a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11; . . . and (f) Rule on any other relevant matters."*
15. Article 61(11) sets out that: *"Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings."*

¹⁵ IT-96-21-T, 16 November 1998 (citing Theodor Meron, "Classifications of armed conflict in the Former Yugoslavia: Nicaragua's Fallout", 92 AJIL 236 (1988) at p. 239).

16. Article 61(11) therefore establishes that, as soon as a Trial Chamber is constituted by the Presidency and assigned a case for which charges have been confirmed, the Trial Chamber is the entity with primary responsibility for that case, with the exception of the amendment of charges process pursuant to Article 61(9) of the Statute and, as examined above, situations where the Trial Chamber has referred a particular issue or issues to the Pre-Trial Chamber or an available judge of the Pre-Trial Division pursuant to Article 64(4).
17. In addition to the specific powers set out in Article 64, the Trial Chamber “may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in” the proceedings before the Trial Chamber. Accordingly, the authority of the Trial Chamber to exercise the functions of the Pre-Trial Chamber is broad in scope but must be considered in light of the particular issue before the Trial Chamber.
18. If the Defence had become aware, in the period following the issuance of the confirmation decision in this case (23 January 2012) but prior to the constitution of Trial Chamber V on 29 March 2012, of the non disclosure of the exculpatory Affidavit of Prosecution Witness 4 and the fact that the Prosecution would not call Witness 4 at trial, it could and would have applied to the Pre-Trial Chamber to reconsider its decision to confirm the charges against Ambassador Muthaura..
19. During the above stated two-month period the Pre-Trial Chamber would have been the only Chamber responsible for the conduct of the case and, the Defence submits, obligated to consider and decide upon an application to nullify and declare void the Confirmation Decision on the above stated basis. The Trial Chamber is now mandated by the Statute with primary responsibility for this case. The Defence submits that the Trial Chamber is manifestly “capable” of

exercising the same power that the Pre-Trial Chamber could have exercised during this two-month period – to consider and decide upon the underlying merits and relief sought in the Article 64(4) Application.

20. The Defence Article 64(4) Application does not request that the Trial Chamber re-open the confirmation hearing process or the Confirmation Decision – essentially, ‘reconsider’ the confirmation decision – which, the Defence submits, is a function that the Trial Chamber is not “capable” of performing. Only the Pre-Trial Chamber may, given the structural division of responsibilities inherent to the Rome Statute, and pursuant to Article 61(7), decide to confirm or decline to confirm a particular charge or adjourn the confirmation hearing under Article 61(7)(c). Instead, and as submitted above, the underlying relief requested in the Article 64(4) Application is the voiding of the Confirmation Decision on the basis of a miscarriage of justice and/or the fact that the fundamental and essential evidentiary basis of the confirmation of charges against Ambassador Muthaura – the evidence of Witness 4 – will not be relied upon by the Prosecution at trial.
21. Further, and as submitted at paragraph 3 above, the Trial Chamber exercising this proposed function is most certainly “relevant” to the proceedings before the Chamber given that the issues at hand must be resolved prior to the commencement of trial, and without such resolution, a fair trial is impossible.

Respectfully Submitted,



Karim A. A. Khan QC
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Dated this 8th Day of March 2013
At The Hague, the Netherlands